WEE CHOO KEONG

v

LEE CHONG MENG & ANOR

COURT OF APPEAL, KUALA LUMPUR
DATO' SITI NORMA YAAKOB JCA
DATO' ABDUL MALEK AHMAD JCA
DATO' ABU MANSOR ALI JCA
[CIVIL APPEAL NO: W-01-149 OF 1995]
29 FEBRUARY 1996

CIVIL PROCEDURE: *Courts of Judicature Act 1964 s. 84 – Leave to refer constitutional questions to the Federal Court – Prerequisites for exercise of discretion by the Judge – True effect of s. 84 – Election petition – Certiorari – Application for an order of certiorari to quash decision of election Judge – Whether certiorari could properly issue – Election Offences Act 1954 s. 36 - Rules of High Court 1980 O. 53 r. 1(1).*

CONSTITUTIONAL LAW: *Election petition – Federal Constitution Article 118 – Interpretation – Whether only creating a machinery for challenging an election – Whether containing any ouster clause.*

CONSTITUTIONAL LAW: *Election petition – Federal Constitution Article 118 – Interpretation – Decision of election Judge – Whether final – Whether amenable to certiorari - Attempt to challenge decision of election Judge by application for leave to refer Article 118 to the Federal Court for interpretation – Whether allowable – Whether Article 118 clear and unambiguous – Whether required no interpretation – Federal Constitution Article 118 – Courts of Judicature Act 1964 s. 84 – Election Offences Act 1954 s. 36.*

ELECTION: *Petition – Election Judge – Whether sitting as a High Court Judge – Whether sitting in an inferior tribunal – Decision of an election Judge – Whether final - Whether amenable to an order of certiorari – Election Offences Act 1954 ss. 32 to 36 – Federal Constitution Article 118 – Rules of the High Court 1980 O. 53.*

WORDS & PHRASES: *"The effect of any provision" – Courts of Judicature Act 1964 s. 84.*

On 25 April 1995, following the General Election of 1995, the appellant was elected the Member of Parliament for the constituency of Bukit Bintang. The facts showed that prior to the election, pursuant to contempt proceedings taken against him, the appellant was fined RM7,000 by the Federal Court. On 2 August 1995, the election Judge ruled that the appellant, by reason of the fine, was disqualified from being a Member of Parliament by virtue of Article

48(1)(e) of the Federal Constitution, and in consequence, declared that the first respondent was the duly elected Member of Parliament for the said constituency. The appellant could not appeal against the ruling, as such a course was barred by s. 36 of the Election Offences Act 1954, and so, on 14 August 1995, the appellant applied to the High Court for leave for an order of *certiorari* to quash the said decision of the election Judge. As it was, the appellant's motion was grounded upon the allegations (i) that the election Judge erred in law in his interpretation of Article 48(1)(e) of the Constitution; (ii) that the election Judge was wrong in law in declaring the first respondent as the properly elected Member of parliament for Bukit Bintang; and (iii) that the decision was fatally flawed in law as the first election petition was a nullity.

The facts further showed that although the substantive application in the proceedings before the learned Judge was whether or not leave ought to be granted under O. 53 of the Rules of the High Court 1980, leave was also sought by the appellant to refer a constitutional question to the Federal Court under s. 84 Courts of Judicature Act 1964, namely, "*whether the provision of Article 118 of the Federal Constitution preclude certiorari from going to quash the decision of an Election Judge*". The learned Judge ruled that *certiorari* could not lie in the circumstances as the Court in which the election Judge sat is not an inferior Court against which an order of *certiorari* could be issued, and so refused leave. As for the application to refer, it was held that the question of law, as framed, had not met the requirements of s. 84 Courts of Judicature Act. Accordingly that application was also dismissed by the learned Judge. The appellant appealed and before the learned Judges of the Court of Appeal the primary issues that arose were:

1. whether the learned Judge was wrong in not having referred to the Federal Court the question relating to the interpretation of Article 118 of the Federal Constitution

2. whether the decision of the election Judge herein was amenable to review by *certiorari* by another Judge.

Held:

Per Siti Norma Yaakob JCA:

[1] The substantive application in the proceedings before the learned High Court Judge was whether leave ought or ought not to be granted under O. 53 of the High Court Rules. The law as to the granting or refusal of leave under O. 53 of the Rules is well-settled and poses no difficulty and it is within the competence of the trial Judge to make a finding whether such leave ought to be granted or not.

[2] As far as the Courts are concerned, judicial review does not lie against the Magistrate Courts, the Sessions Courts, the High Courts or the Court of Appeal, but only against decisions of inferior Courts or tribunals. The

Court where the election Judge sits, however, is not an inferior Court, but is very much part of the High Court exercising a special jurisdiction. This being the case, the order of *certiorari* does not lie to quash the decision of the election Judge. To this end, the learned Judge was correct when he dismissed the appellant's application for leave under O. 53 r. 1(1).

[3] All that Article 118 of the Federal Constitution seeks to define is that a Parliamentary or State election can only be questioned through an election petition and that such petition should be presented to the High Court having jurisdiction where the election took place. The Article is silent as to the finality of the proceedings in the election petition, nor was any mention made as to whether there is any right to a judicial review of the determination of the election petition. As the law stands, the finality of an election petition is clearly spelt out by s. 36 of the Election Offences Act 1954.

[4] Before exercising his discretion under s. 84 Courts of Judicature Act 1964, the Judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end. This apart, there must also be a difficult issue or issues posed by the dispute that are irreconciable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary.

[5] There is nothing ambiguous or uncertain about Article 118. It merely creates the machinery for challenging an election and the place where the challenge can be pronounced, and goes no further than that. This being the case, this Court cannot see how the substantive application for leave (for an order of *certiorari* herein) can have any bearing to the provisions of Article 118. Whilst the former concerns the issue as to whether the decision of the election Judge is amenable to *certiorari*, the latter deals with a totally different matter altogether and therefore requires no prior determination of its provisions.

[6] In so far as it concerns the substantive part of how an election petition is to be dealt with, the necessary provisions are provided for by Part VII of the 1954 Act. However, quite apart from the differing subject matters dealt with by Article 118 and Part VII of the Act, it also cannot be reconciled that the constitutional question sought to be referred can have the effect of bringing "the speedy and economical final determination of the proceedings" before the learned trial Judge.

[7] The reference to *Syarikat Kenderaan* is not of much assistance to the appellant. As it was, that case was interpreting the effect of an ouster clause that is expressed in a particular statute whereas Article 118 contains no ouster clause. What the appellant wants the Federal Court to answer is that there is such an implied ouster clause in Article 118, which is not the case.

[8] In the circumstances, this Court is loathe to disturb the finding of the learned Judge as he had exercised his discretion correctly when he declined to refer Article 118 to the Federal Court.

Per Abdul Malek Ahmad JCA (concurring):

[1] The law is well-settled that there shall be no appeal from the decision of an election Judge. That this is so is made clear by s. 36 of the Election Offences Act 1954, as well as by such decisions as *Re Perting Timor Election (No. 2), Tunku Abdullah v. Ali Amberan* and *Dasun Gabon v. Zulkifle bin Majun & 21 Other Cases.*

[2] The Court in which the election Judge sits is not an inferior Court against which an order of *certiorari* can be issued. There is therefore no judicial review of the decision of an election Judge who for all intents and purposes has coordinate jurisdiction with, and not inferior jurisdiction to, a High Court Judge.

[3] The phrase "the effect of any provision" in s. 84 of the Courts of Judicature Act, 1964 means a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court. However, Article 118 of the Federal Constitution is crystal clear and the learned trial Judge was correct in not acceding to the request of the learned Counsel for the appellant. By Article 118, an election can only be called in question by an election petition which in this instance had taken place. So, whatever the decision of the election Judge, including his finding on the interpretation of Article 48(1)(e) of the Federal Court, rightly or wrongly, that decision stands.

Per Abu Mansor Ali JCA (concurring):

[1] There is no merit in the contention that the learned Judge had erred in refusing the application to refer. It is settled law that a reference is only done if a question arises in the course of the proceedings before him and there is ambiguity and that it would help advance the rapid conclusion of that proceeding. Article 118 cannot be more clear that it needed the interpretation of the Federal Court.

[2] Shorn of all its ramifications, the appellant's application, in substance, if allowed, was really an attempt whose prime object was to challenge and to upset the decision of the election Judge which Parliament, in its wisdom by s. 34 to s. 36 of the Election Offences Act, has provided a mode of challenging by an election petition. And by the said s. 36, Parliament has laid down that the Judge's decision is final. Bearing these in mind, the answer the learned Judge would have arrived at was a refusal to refer and that, in my view, was correct.

[3] The first principle of review has been settled and it must be review of a decision of an inferior tribunal over which the Court has supervisory jurisdiction. The decision of the election Judge here is not a decision of such a tribunal and this affords sufficient answer to the contention of the appellant that the election Judge's decision is amenable to *certiorari*.

[Appeal dismissed. Decision of High Court confirmed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Seksyen 84, Akta Mahkamah Kehakiman 1964 – Kebenaran untuk merujuk persoalan perlembagaan kepada Mahkamah Persekutuan – Prasyarat bagi pelaksanaan budibicara oleh Hakim – Kesan sebenar s. 84 – Petisyen pilihanraya – Certiorari – Permohonan untuk perintah certiorari untuk mengepikan keputusan Hakim pilihanraya - Samada certiorari boleh dikeluarkan – Akta Kesalahan Pilihanraya 1954 s. 36 – Kaedah-kaedah Mahkamah Tinggi 1980 A. 53 k. 1(1).*

***UNDANG-UNDANG PERLEMBAGAAN:** Petisyen pilihanraya – Perkara 118 Perlembagaan Persekutuan – Tafsiran – Samada hanya mewujudkan satu jentera bagi mencabar sesuatu pilihanraya – Samada mengandungi apa-apa fasal penyingkiran.*

***UNDANG-UNDANG PERLEMBAGAAN:** Petisyen pilihanraya – Perkara 118 Perlembagaan Persekutuan – Tafsiran – Keputusan Hakim pilihanraya – Samada muktamad – Samada boleh dicabar melalui certiorari – Percubaan untuk mencabar keputusan Hakim pilihanraya melalui permohonan untuk kebenaran bagi merujuk Perkara 118 kepada Mahkamah Persekutuan untuk tafsiran – Samada boleh dibenarkan – Samada Perkara 118 jelas dan tidak kabur – Samada tidak memerlukan tafsiran – Perkara 118 Perlembagaan Persekutuan – Seksyen 84 Akta Mahkamah Kehakiman, 1964 - Seksyen 36 Akta Kesalahan Pilihanraya 1954.*

***PILIHANRAYA:** Petisyen – Hakim pilihanraya – Samada bersidang sebagai Hakim Mahkamah Tinggi – Samada bersidang dalam tribunal bawahan – Keputusan Hakim pilihanraya – Samada muktamad – Samada*

boleh dicabar melalui satu perintah certiorari – Seksyen 32 hingga 36 Akta Kesalahan Pilihanraya 1954 – Perkara 118 Perlembagaan Persekutuan – Aturan 53 Kaedah-kaedah Mahkamah Tinggi 1980.

PERKATAAN & ISTILAH: *"kesan mana-mana peruntukan" – Seksyen 84 Akta Mahkamah Kehakiman 1964.*

Pada 25 April 1995, berikutan Pilihanraya Umum 1995, perayu telah dipilih sebagai Ahli Parlimen bagi kawasan pilihanraya Bukit Bintang. Fakta menunjukkan bahawa sebelum pilihanraya tersebut, ekoran satu prosiding penghinaan yang diambil terhadapnya, perayu telah dikenakan denda sebanyak RM7,000 oleh Mahkamah Persekutuan. Pada 2 Ogos 1995, Hakim pilihanraya memutuskan bahawa perayu, disebabkan oleh denda yang dikenakan, telah terlucut kelayakannya daripada menjadi seorang Ahli Parlimen menurut Perkara 48(1)(e) Perlembagaan Persekutuan, dan akibat daripada itu, mengisytiharkan bahawa responden pertama adalah merupakan Ahli Parlimen yang dipilih bagi kawasan pilihanraya tersebut. Perayu tidak dapat merayu terhadap keputusan itu, oleh kerana tindakan sedemikian dihalang oleh s. 36 Akta Kesalahan Pilihanraya 1954, dan oleh kerana itu, pada 14 Ogos 1995, perayu memohon kepada Mahkamah Tinggi untuk kebenaran bagi mendapatkan satu perintah *certiorari* bagi membatalkan keputusan Hakim pilihanraya tersebut. Sepertimana halnya, usul perayu tersebut telah dilandaskan atas dakwaan-dakwaan (i) bahawa Hakim pilihanraya telah tersalah pertimbangan di sisi undang-undang dalam pantafsiran Perkara 48(1)(c) Perlembagaan (ii) bahawa Hakim pilihanraya salah di sisi undang-undang dalam mengisytiharkan responden pertama sebagai Ahli Parlimen yang terpilih bagi kawasan pilihanraya Bukit Bintang dan (iii) bahawa keputusan Hakim pilihanraya adalah cacat dengan cara yang memudaratkan kerana petisyen pilihanraya yang pertama merupakan suatu pembatalan.

Fakta selanjutnya menunjukkan bahawa walaupun permohonan substantial dalam prosiding yang terdapat di hadapan Hakim yang bijaksana adalah samada kebenaran harus atau tidak harus diberikan di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi 1980, kebenaran adalah juga dipohon oleh perayu untuk merujuk satu persoalan perlembagaan kepada Mahkamah Persekutuan di bawah s. 84 Akta Mahkamah Kehakiman 1964, iaitu, "whether the provision of Article 118 of the Federal Constitution preclude *certiorari* from going to quash the decision of an Election Judge". Hakim yang bijaksana memutuskan bahawa *certiorari* tidak boleh diberikan dalam halkeadaan yang wujud oleh kerana Mahkamah dalam mana Hakim pilihanraya bersidang bukannya sebuah Mahkamah bawahan terhadap mana satu perintah *certiorari* boleh dikeluarkan, dan dengan itu menolak permohonan. Berhubung dengan permohonan untuk merujuk, ianya telah diputuskan bahawa persoalan undang-undang, sepertimana yang dirangkakan, tidak memenuhi kehendak-kehendak s. 84 Akta Mahkamah Kehakiman. Berikutan itu, permohonan tersebut juga telah ditolak oleh Hakim

yang bijaksana. Perayu telah merayu dan di hadapan Hakim-Hakim Mahkamah Rayuan yang bijaksana, isu utama yang berbangkit adalah:

1. Samada Hakim yang bijaksana salah apabila tidak merujuk persoalan berhubung dengan pentafsiran Perkara 118 Perlembagaan Persekutuan kepada Mahkamah Persekutuan.

2. Samada keputusan Hakim pilihanraya di sini boleh dikaji semula melalui *certiorari* oleh seorang Hakim yang lain.

Diputuskan:

Oleh Siti Norma Yaakob HMR:

[1] Permohonan substantif dalam prosiding di hadapan Hakim Mahkamah Tinggi yang bijaksana, adalah samada kebenaran seharusnya diberikan atau tidak di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi. Undang-undang berhubung dengan pemberian atau penolakan kebenaran adalah jelas dan tidak merupakan suatu kesukaran dan ianya adalah dalam bidangkuasa Hakim perbicaraan untuk menentukan samada kebenaran harus diberikan atau pun tidak.

[2] Sejauhmana ianya berkaitan dengan Mahkamah, kajian semula kehakiman tidak boleh dibuat terhadap Mahkamah Majistret, Mahkamah Sesyen, Mahkamah Tinggi ataupun Mahkamah Rayuan, tetapi hanya terhadap keputusan-keputusan Mahkamah bawahan atau tribunal-tribunal. Mahkamah di mana Hakim pilihanraya bersidang, walaubagaimanapun, bukannya sebuah Mahkamah bawahan, tetapi adalah sebahagian daripada Mahkamah Tinggi yang melaksanakan suatu bidangkuasa yang khas. Dalam keadaan ini, perintah *certiorari* tidak boleh dilaksanakan bagi membatalkan keputusan Hakim pilihanraya. Hakim yang bijaksana adalah betul ketika beliau menolak permohonan perayu untuk kebenaran di bawah A. 53 k. 1(1).

[3] Apa yang ditakrifkan oleh Perkara 118 Perlembagaan Persekutuan adalah bahawa sesuatu pilihanraya Parlimen atau Negeri hanya boleh dipersoalkan melalui satu petisyen pilihanraya dan bahawa petisyen yang sedemikian seharusnya dikemukakan kepada Mahkamah yang mempunyai bidangkuasa di mana pilihanraya tersebut dijalankan. Perkara tersebut tidak menyebut kemuktamadan prosiding-prosiding dalam petisyen pilihanraya, tidak juga disebut mengenai samada terdapatnya apa-apa hak kepada kajian semula terhadap keputusan petisyen pilihanraya itu. Sepertimana yang terdapat di sisi undang-undang, kemuktamadan sesuatu petisyen pilihanraya jelas dinyatakan oleh s. 36 Akta Kesalahan Pilihanraya 1954.

[4] Sebelum melaksanakan budibicaranya di bawah s. 84 Akta Mahkamah Kehakiman 1964, Hakim mestilah berpuashati bahawa persoalan perlembagaan yang cuba dirujuk mempunyai perkaitan dengan perkara yang dipertikaikan di hadapan beliau, dan bahawa keputusan Mahkamah

Persekutuan mestilah mempunyai kesan bagi menyelesaikan penentuan pertikaian yang terbentang dihadapannya dengan cepat dan jimat. Selain itu haruslah juga terdapat isu atau isu-isu-isu yang sukar yang dibangkitkan oleh pertikaian tersebut yang sangat bertentangan dengan peruntukan berperlembagaan. Hanya dalam keadaan begini sahaja rujukan suatu persoalan perlembagaan menjadi perlu.

[5] Tidak terdapat apa-apa yang tidak jelas atau tidak pasti mengenai Perkara 118. Ianya hanya mewujudkan satu mekanisme untuk mencabar sesuatu pilihanraya dan tempat di mana cabaran tersebut boleh diumumkan, tidak lebih daripada itu. Oleh yang demikian, Mahkamah ini tidak dapat melihat bagaimana permohonan substantif bagi mendapatkan kebenaran untuk satu perintah *certiorari* di sini boleh mempunyai apa-apa perkaitan dengan peruntukan-peruntukan Perkara 118. Sementara perkara yang terdahulu menyentuh isu mengenai samada keputusan Hakim Perbicaraan boleh dikajisemula melalui *certiorari,* perkara yang kemudian pula menyentuh perkara-perkara yang sama sekali berlainan dan oleh itu tidak memerlukan penentuan terdahulu akan peruntukan-peruntukannya.

[6] Sejauhmana ianya menyentuh perkara substantif bagaimana sesuatu petisyen pilihanraya seharusnya diuruskan, peruntukan-peruntukan mengenainya terdapat dalam Bahagian VII Akta 1954. Walaubagaimanapun, selain daripada hal-hal perkara yang berbeza yang dirangkum oleh Perkara 118 dan bahagian VII Akta tersebut, ianya juga tidak boleh diterima bagaimana soalan pelembagaan yang diminta untuk dirujuk di sini boleh mempunyai kesan yang membawa kepada "the speedy and economical final determination of the proceedings" yang dikemukakan di hadapan Hakim perbicaraan yang bijaksana itu.

[7] Rujukan kepada *Syarikat Kenderaan* tidak membantu perayu. Sepertimana halnya, kes itu mentafsirkan kesan satu fasal penyingkiran yang dinyatakan dalam sesuatu statut yang khas, sedangkan Perkara 118 tidak mengandungi fasal penyingkiran. Apa yang dikehendaki oleh perayu untuk dijawab oleh Mahkamah Persekutuan adalah bahawa terdapat fasal penyingkiran yang tersirat dalam Perkara 118, sedangkan kedudukannya bukanlah sedemikian.

[8] Dalam halkeadaan yang wujud, Mahkamah merasa keberatan untuk menggangui keputusan Hakim yang bijaksana kerana beliau telah melaksanakan keputusannya dengan betul apabila beliau enggan untuk merujuk Perkara 118 kepada Mahkamah Persekutuan.

Oleh Abdul Malek Ahmad HMR (menyetujui):

[1] Adalah jelas di sisi undang-undang bahawa tidak seharusnya terdapat rayuan daripada keputusan seorang Hakim pilihanraya. Bahawa perkara ini adalah sedemikian rupa, jelas dilihat dalam s. 36 Akta Kesalahan Pilihanraya 1954, dan juga dalam keputusan-keputusan sedemikian

sepertimana yang terdapat dalam *Re Perting Timor Election (No. 2), Tunku Abdullah v. Ali Amberan* dan *Dasun Gabon v. Zulkifle bin Majun & 21 Other Cases.*

[2] Mahkamah di mana Hakim pilihanraya bersidang bukannya merupakan Mahkamah bawahan terhadap mana perintah *certiorari* boleh dikeluarkan. Oleh itu tidak terdapat kajian semula akan keputusan seorang Hakim pilihanraya yang bagi kesemua tujuan dan maksud mempunyai bidangkuasa selaras dengan, dan bukannya bidangkuasa bawahan kepada, seorang Hakim Mahkamah Tinggi.

[3] Ungkapan "kesan mana-mana peruntukan" dalam s. 84 Akta Mahkamah Kehakiman 1964, bermaksud satu peruntukan berpelembagaan yang meninggalkan ruang bagi membangkitkan keraguan dalam pengertian bahawa ianya samar-samar dan taksah, yang mana memerlukan satu pentafsiran yang wajar akan pengertiannya daripada Mahkamah Persekutuan. Perkara 118 Perlembagaan Persekutuan, bagaimanapun, adalah amat jelas dan Hakim perbicaraan yang bijaksana adalah betul dalam tidak menyetujui kepada permintaan Peguam perayu yang bijaksana. Melalui perkara 118, sesuatu pilihanraya hanya boleh dipersoalkan oleh satu petisyen pilihanraya yang mana dalam keadaan ini telah pun berlaku. Oleh itu, apapun keputusan yang dicapai oleh Hakim pilihanraya, termasuk keputusannya terhadap tafsiran Perkara 48(1)(e) Mahkamah Persekutuan, secara betul ataupun tidak, keputusan itu berkuatkuasa.

Oleh Abu Mansor Ali HMR (menyetujui):

[1] Tidak terdapat apa-apa merit dalam penegasan bahawa Hakim yang bijaksana telah tersalah dalam menolak permohonan untuk merujuk. Ianya adalah undang-undang yang terpakai bahawa rujukan hanya dilakukan jika sesuatu persoalan berbangkit dalam perjalanan prosiding di hadapannya dan terdapat kekaburan dan bahawa ianya akan membantu menyegerakan penyelesaian prosiding itu. Perkara 118 adalah sangat jelas sehingga ianya tidak memerlukan pentafsiran Mahkamah Persekutuan.

[2] Pada amnya, permohonan perayu, jika dibenarkan, adalah sebenarnya suatu percubaan dengan matlamat utamanya untuk mencabar dan menganggu keputusan Hakim pilihanraya, yang mana Parlimen, dalam kebijaksanaannya melalui s. 34 hingga s. 36 Akta Kesalahan Pilihanraya telah memperuntukkan satu cara untuk mencabar melalui petisyen pilihanraya. Dan melalui s. 36 itu, Parlimen telah membentangkan bahawa keputusan Hakim tersebut adalah muktamad. Dengan memikirkan perkara ini, jawapan yang mungkin dicapai oleh Hakim yang bijaksana adalah penolakan kebenaran untuk merujuk, dan itu, menurut pandangan saya, adalah betul.

[3] Prinsip pertama kajian semula telah berdiri kukuh, yang mana, ianya mestilah merupakan kajian semula keputusan sebuah tribunal bawahan terhadap mana Mahkamah mempunyai bidangkuasa penyeliaan. Keputusan Hakim perbicaraan di sini bukannya merupakan keputusan tribunal yang sedemikian dan ini memberikan jawapan yang memadai kepada penegasan perayu bahawa keputusan Hakim pilihanraya adalah tertakluk kepada *certiorari.*

[Rayuan ditolak. Keputusan Mahkamah Tinggi disahkan]

Cases referred to:

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***

South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors. [1981] AC 363 ***(cit)***

Ignatius Stephen Malanjum v. Election Judge Sabah & Anor. [1989] 2 MLJ 549 ***(foll)***

Re Perting Timor Election (No. 2) [1962] 28 MLJ 333 ***(foll)***

Tunku Abdullah v. Ali Amberan [1971] 1 MLJ 25 ***(foll)***

Dasun Gabon v. Zulkifle bin Majun & 21 Other Cases [1982] 1 MLJ 315 ***(foll)***

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(refd)***

Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 3 MLJ 228 ***(dist)***

Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor. [1979] 2 MLJ 143 ***(refd)***

Legislation referred to:

Election Offences Act 1954, ss. 33(1), 36
Rules of the High Court 1980, O. 53 r. 1(1)
Courts of Judicature Act 1964, ss. 68(2), 74, 84

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Stanley Isaacs, SFC (Haliza Aini Othman with him)

JUDGMENT

Siti Norma Yaakob JCA:

To appreciate the nature of this appeal before us, it is necessary that we begin with some factual background.

At the General Elections held on 25 April 1995, three contenders vied for the Parliamentary seat for the Bukit Bintang Constituency. The three were Mr. Wee Choo Keong, the appellant before us, Mr. Lee Chong Meng, the 1st respondent and Mr. Teng Chang Khim, who is not a party in this appeal.

The appellant was duly elected the Member of Parliament for Bukit Bintang but his election was challenged by firstly the 1st respondent, who filed an election petition, PP-1-95 on 19 June 1995 and secondly by Mr. Wong Yook Sung @ Wong Tong Lim, the 2nd respondent and a voter at the same constituency, who filed a separate election petition, PP-3-95 on 2 August 1995.

Both election petitions were filed pursuant to the provisions of Article 118 of the Federal Constitution and both cited the Election Commission, the Returning Officer for the Bukit Bintang Constituency and the appellant, as respondents. The challenge in both petitions is grounded on the fact that the appellant had been convicted of the offence of contempt of Court and fined RM7,000, and hence disqualified to be a Member of Parliament under the provisions of Article 48(l)(e) of the Federal Constitution.

It is common ground that in proceedings brought by MBf Holdings Bhd. and another against the appellant and two others, Dato' Anuar Zainal Abidin J (as he then was) had granted an injunction against the appellant on 9 February 1993 restraining him from printing, circulating, distributing or publishing any allegation impropriety or irregularity or illegality against MBf Holdings and its subsidiaries.

In subsequent committal proceedings commenced against the appellant, the learned Judge found on 31 December 1993 that the appellant had breached the injunction and had also evaded service of the said injunction. On 28 January 1994, the appellant was sentenced to 2 years imprisonment for the breach and another 2 years for the evasion of service charge.

On appeal, the Federal Court on 14 April 1995 by a unanimous decision set aside Dato Anuar Zainal Abidin J's finding on the breach and sentence and by a majority of 2 to 1 confirmed his finding on the evasion of service of the injunction, set aside the sentence of 2 years imprisonment and substituted it with a fine of RM7,000. It was on the basis of this contempt that the election of the appellant was challenged.

Dato Ahmad Fairuz, J (as he then was) was nominated by the Chief Judge of Malaya under the provisions of s. 33(l) of the Election Offences Act, 1954 (the Act) to try the two election petitions. On 2 August 1995, the learned High Court Judge made the following findings:

(1) That the contempt of evading service of the injunction by the appellant is a criminal offence.

(2) Under such circumstances, the Returning Officer ought not to have accepted the appellant's nomination papers on 15 April 1995 (Nomination Day) as at that point of time, the appellant was already convicted of a criminal offence and sentenced to a fine of RM7,000 and therefore disqualified under the provisions of Article 48(l)(e) of the Federal Consitution and to that end he was not duly elected or properly returned.

Consequent upon these findings, the learned Election Judge made 2 declarations.

(1) That the appellant had not been properly and legally elected and

(2) That the 1st respondent is the duly elected Member of Parliament for Bukit Bintang.

As the appellant is barred by s. 36 of the Act from appealing against the decision of the election he instead filed Originating Motion Rl-25-127-95 in the appellate and Special Powers Division of the High Court at Kuala Lumpur, citing the election Judge, (this was later struck out) the 1st and 2nd respondents as respondents and praying for leave *ex parte* to apply for an order of *certiorari* to quash the decision of the election Judge made on 2 August 1995. In his statement in support he contends that the election Judge had erred in law in his interpretation of Article 48(l)(e) of the Federal Constitution and in declaring the 1st respondent as the duly elected Member of Parliament for the Bukit Bintang constituency.

Although the substantive application in the Originating Motion was for leave under O. 53 of the Rules of High Court, 1980, Dato' Mohd. Nor Ahmad J, who heard the motion had at the outset of the hearing before him, to contend with an application by the appellant to refer a question of law to the Federal Court relating to the effect of Article 118 of the Federal Constitution. Notice of intention to refer had been given by the appellant to the respondents and the Court. On 28 September 1995 the learned trial Judge dismissed both the applications to refer as well as the application for leave with costs and it is against this order that the appeal before us is founded.

The appellant lists 5 grounds in his memorandum of appeal, but before us arguments were confined to only 3 namely:

(1) the failure of the learned trial Judge to refer to the Federal Court a question of law of public importance relating to the effect of Article 118 of the Federal Constitution.

(2) the failure of the learned trial Judge to conclude that the decision of the election Judge was amenable to *certiorari.*

(3) the failure of the learned trial Judge to grant leave to issue an order of *certiorari* to quash the decision of the election Judge, having regard to the law, facts and the circumstances of the case.

From the record of proceedings in the Court below, arguments were centred principally on the application to refer. Before us Mr. Karpal Singh of Counsel for the appellant was quick to respond that he was not abandoning his substantive application for leave altogether and with that confirmation, arguments proceeded before us on the basis of the application to refer as well as on the application for leave.

The application to refer the question of law was made pursuant to the provisions of s. 84 of the Courts of Judicature Act, 1964, which states as follows.

> 84. Reference of constitutional question by High Court.
>
> (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be Just to await the decision of the question by the Federal Court.
>
> (2) An order staying proceedings under this section may be made by the Judge on his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
>
> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer been affirmative or the negative.
>
> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of Court of the Federal Court.

The question of law sought to be referred has been framed by the appellant as follows:

> Whether the provisions of Article 118 of the Federal Constitution preclude *certiorari* from going to quash the decision of an Election Judge.

Article 118 of the Federal Constitution is expressed in the following terms:

> 118. Method of challenging election. No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

As a matter of completeness, I also reproduce the provisions of Article 48(l)(e) of the Federal Constitution as that Article featured prominently in the decision of the election Judge.

> 48. Disqualification for membership of Parliament.
>
> (1) Subject to the provisions of this Article, a person is disqualified for being a member of either House of Parliment if -

(a) ...

(b) ...

(c) ...

(d) ...

(e) he has been convicted of an offence by a Court of law in the Federation (or, before Malaysia Day, in the territories comprised in the State of Sabah or Sarawak or in Singapore) and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon; or.

It is Mr. Karpal Singh's submission that the only remedy afforded by Article 118 by which an aggrieved party can challenge a Federal or State election is through the procedure of filing an election petition in the High Court where the election took place. To that end he contends that Article 118 is a finality clause and like any other ouster clause present in any other statute, it does not stultify the High Court from reviewing the decision of a tribunal which contains an error of law. For this he relies on the case of *Syarikat Kenderaan Melayu Kelantan Bhd. v Transport Workers Union* [1995] 2 CLJ 748. In this instance that tribunal is the Court of the election Judge that declared the election of the appellant to be improper.

Mr. Karpal Singh also identifies the error committed by the election Judge to be his declaration that the 1st respondent was duly elected after finding the appellant to be disqualified under Article 48(l)(e). He views the effect of such declaration to be that whilst the appellant was elected by the people, the 1st respondent was however, elected by the Court, a situation that is never envisaged in a true democracy. He further contends that the contempt of Court which the appellant was found guilty of by the Federal Court is not a criminal offence as such as it relates to evasion of service of an Order of Court arising from proceedings which are civil in nature. Moreover Article 48(l)(e) disqualifies a person from being a Member of Parliament if he is "convicted of an offence" and these words" must mean that such conviction must be recorded. It is an undisputed fact that no conviction has been recorded against the appellant.

It is to correct all these errors that the appellant now wants the provisions of Article 118 to be interpreted, and defined by the Federal Court particularly whether the Article provides only one remedy for challenging a Parliamentary or State election or whether it allows for other remedies like the right of a judicial review through the issue of *certiorari.*

If the Federal Court decides that the Article envisages other remedies besides the filing of an election petition, then the matter can be reverted back to the learned High Court Judge who would then consider whether leave can be granted.

We will first consider the effect of s. 84 of the Courts of Judicature Act 1964, under which the application to refer was made. It relates to the situation where in any proceedings before the High Court the Judge may in his discretion refer a question relating to the effect of any provision of the Constitution to the Federal Court by way of a special case. Before deciding so the Judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end. In some way the dispute must be related to the constitutional question sought to be referred and that there must be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary.

Dato' Mohd. Nor Ahmad J declined to refer to the Federal Court the question of whether the provisions of Article 118 preclude *certiorari* from going to quash the decision of Dato' Mohd. Fairuz J, (as he then was). The issue then is whether the learned trial Judge had exercised his discretion rightly or wrongly.

Before dealing with that issue there is one aspect of the learned Judge's judgment that we find irreconcilable. At para. 4 of his judgment he had expressed his opinion that the application to refer should have been made before the election Judge when the provisions of Article 48(l)(e) of the Federal Constitution was in issue before him as the election Judge was equally seised of the jurisdiction to refer as his Court was very much part and parcel of the High Court. If that is what is intended to mean, does it follow that the learned trial Judge is of the opinion that he was not seised with the jurisdiction to refer under s. 84, when clearly he had alluded to it at great length in the earlier part of his judgment?

To put that doubt at rest, we need to point out that s. 84 speaks of "any proceedings in the High Court" and by that very broad definition, the learned Judge was indeed seised of the jurisdiction to refer under s. 84 but the fact that the application to refer had not been made earlier before the election Judge makes no difference to his jurisdiction nor prejudice the appellant in any way for it may well be that the appellant had taken a tactical approach by not applying for it earlier before the election Judge.

Returning to the issue at hand it must be remembered that the substantive application in the proceedings before the learned High Court Judge was whether leave ought to or ought not to be granted under O. 53 of the High Court Rules. The merits of whether *certiorari* should or should not be issued had yet to be argued at that stage.

Casting our attention to Article 118, all that particular Article seeks to define is that a Parliamentary or State election can only be questioned through an election petition and that such petition be presented to the High Court having

jurisdiction where the election took place. It is silent as to the finality of the proceedings in the election petition nor any mention made as to whether there is any right to a judicial review of the determination of the election petition. Neither can it be read to mean that it includes an ouster clause as well. To maintain so would amount to putting words and meanings into Article 118 that are not present and rewriting the whole Article.

The finality of an election petition is clearly spelt out by s. 36 of the Act which after all is the principal Act governing all matters relating to election petitions. The fact that Parliament chose not to make provisions about the finality of an election petition in the Federal Constitution, as it did in respect of proceedings in the Special Court as can be seen from Article 182(6) does not, *ipso facto*, amount to our interpreting Article 118 as impliedly containing provisions as to finality. If indeed Parliament intended Article 118 to be a finality clause, it could easily have made provisions similar to Article 182(6). Since it did not we do not consider it proper to question why the finality of an election petition is expressed in the statute governing election petitions and not in the Federal Constitution itself. Suffice it is for us to say that Parliament in its wisdom saw it fit to have the finality clause expressed in the Act which was specially enacted and not in the supreme law of the land.

There is nothing ambiguous or uncertain about Article 118. It merely creates the machinery for challenging an election and the place where the challenge can be pronounced. It goes no further than just that. It is for this reason that we cannot see how the substantive application for leave has any bearing to the provisions of Article 118. Whilst the former concerns the issue as to whether the decision of the election Judge is amenable to *certiorari*, the latter deals with a totally different matter altogether and therefore requires no prior determination of its provisions. Moreover the law as to the granting or refusal of leave under O. 53 of the Rules is well-settled and poses no difficulty and it is within the competence of the learned trial Judge to make a finding whether such leave ought to be granted or not.

When it comes to the substantive part of how an election petition is to be dealt with, Part VII of the Act makes all the necessary provisions like the appointment and powers of the election Judge at s. 33, the persons who may present the petition at s. 34, the relief that may be claimed at s. 35, the finality of the petition at s. 36 and the procedure and practice applicable at s. 42, to cite a few of such provisions.

Quite apart from the differing subject matters dealt with by Article 118 and Part VII of the Act, we cannot reconcile that the constitutional question sought to be referred can have the effect of bringing "the speedy and economical final determination of the proceedings" before the learned trial Judge. Mr. Karpal Singh quite unconciously admitted this to be so when he pleaded that all that the appellant wants is to have the constitutional question referred to

the Federal Court and should the Federal Court decide that *certiorari* lie to quash a decision of an election Judge, the matter for leave be reverted to the High Court so that it can be argued at length before the learned Judge. This may well, explain the reason why no arguments to support the application for leave were advanced in the Court below.

Since the appellant is relying on *Syarikat Kenderaan's* case, we need to say a few words about it. That case was decided by this Court before another panel made up of Gopal Sri Ram, N.H. Chan and V.C. George, JJCA. What was required to be decided in that case was whether the provisions of subsection (1) of s. 33B of the Industrial Relations Act, 1967, which is an ouster clause, disable the High Court from exercising its Judicial review over awards of the Industrial Court. It was held that they did not for so long as the Industrial Court, an inferior tribunal makes an error of law regardless of whether such error goes to jurisdiction. In so deciding the Court has not followed the controversial decision of the Privy Council in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union Ors.* [1981] AC 363, which drew a distinction between an error of law affecting jurisdiction and one which did not. The Court declared that *Fire Bricks* is no longer good law. Since this case illustrates the futility of an ouster clause to oust the supervisory jurisdiction of the High Court to review the decision of an inferior tribunal which contains an error of law, Mr. Karpal Singh wants us to have Article 118 referred to the Federal Court so that the error or errors made by the election Judge can be reviewed by way of *certiorari*.

We do not consider that the decision of *Syarikat Kenderaan* can be of much assistance to us as the Court in that case was interpreting the effect of an ouster clause that is expressed in a particular statute. Article 118 contains no expressed ouster clause. What the appellant wants the Federal Court to answer is that there is such an implied ouster clause in Article 118, which we say is not the case.

For the reasons that we have given, we are loathe to disturb the finding of the learned Judge as he had exercised his discretion correctly when he declined to refer Article 118 to the Federal Court.

Coming now to the question of leave, this must first be obtained under O. 53 r. 1(1), before an application for *certiorari* can be made. The requirement of obtaining such leave which normally is applied for *ex parte* is to eliminate at an early stage any application for judicial review which is frivolous, vexatious or hopeless.

A pertinent question to be asked at the leave hearing is against whom does judicial review lie. As far as Courts are concerned judicial review does not lie against the Magistrate Courts, the Sessions Courts, the High Courts or the Court of Appeal, but only against decisions of inferior Courts (e.g. the Industrial

Court) or tribunals (e.g. the Special Commissioners of Income Tax). This is so as the alternative remedy of appeals is available to the other or superior Courts.

We next ask ourselves whether the Court of the election Judge whose decision is being impugned is an inferior Court.

That same issue has already been decided in the case of *Ignatius Stephen Malanjum v. Election Judge Sabah & Anor.* (unreported) where in its oral judgment, the then Supreme Court held that when an election Judge hears an election petition, he sits in the High Court. He constitutes a special tribunal where the necessary incident of appeal does not apply. As such the Court where the election Judge sits is not an inferior Court against which an order of *certiorari* can be issued.

Mr. Karpal Singh has urged us not to take cognisance of this case as the structure of the Courts in this country then was very much different to what it is today. With the establishment of the Court of Appeal on 24 June 1994, there is now a 3-tier appellate jurisdiction exercised by the High Court, the Court of Appeal and the Federal Court, quite unlike the pre - 24 June 1994 situation when only the High Court and the Supreme Court exercised appellate jurisdiction. For this reason, he considers that the Supreme Court then can never be equated to the Federal Court now, the highest tribunal and the final Court of appeal in the country.

With respect we cannot accept his submission as the Federal Court is very much the successor of the Supreme Court. It assumed a different name with the establishment of the Court of Appeal and apart from that difference the Supreme Court was the final Court of appeal in the country before 24 June 1994. As such it ranks on the same status as the present Federal Court and it can never be equated to anything lesser. If the Court of Appeal had been in existence then it would still be the intermediate Court between the High Court and the Supreme Court, a situation that is no more, different than what it is today the only exception being that the highest tribunal has assumed a new name.

Being members of the Court that is subordinate to the highest tribunal in the country, we are bound by the principle of *stare decisis* to accept the decision of *Malanjum's* case as binding upon us. Thus the order of *certiorari* does not lie to quash the decision of the election Judge as his Court is not an inferior Court, but is very much part of the High Court exercising a special jurisdiction. To that end the learned trial Judge was correct when he dismissed the appellant's application for leave under O. 53 r. 1(1).

For the reasons that we have given, we dismiss this appeal with costs, we confirm the decision of the High Court and the deposit made by the appellant be paid to the respondents to account of their taxed costs.

Abdul Malek Ahmad JCA:

Article 48(1) (e) of the Federal Constitution states that a person is disqualified for being a member of either House of Parliament if he has been convicted of an offence by a Court of law in the Federation and sentenced to imprisonment for a term of not less than one year or to a fine of not less than RM2,000 and has not received a free pardon. The day before nomination day, namely on 14 April 1995, the appellant had been fined RM7,000 by the Federal Court by a majority of one.

Despite that, he was not rejected by the Returning Officer on nomination day and went on to win the seat in the Parliamentary constituency of Bukit Bintang on 25 April 1995. This of course incurred the wrath of the first respondent, who was one of the two losing candidates, who had accordingly filed the election petition in question and on 2 August 1995, the election Judge had found in his favour.

Naturally upset by this turn of events, the appellant had on 14 August 1995 filed an Originating Motion against the election Judge and the respondents to apply for leave for an order of *certiorari* to quash the decision of the election Judge made on 2 August 1995 whereby the appellant was disqualified as the Member of Parliament for the Parliamentary constituency of Bukit Bintang and the first respondent was duly declared as the proper elected Member of Parliament for that constituency. The application against the election Judge was subsequently withdrawn.

The grounds in support of that Originating Motion as found in the accompanying statement were that the decision of the election Judge dated the 2 August 1995 reflected an error on the face of the record and is in excess of jurisdiction for the following reasons:

(a) the election Judge erred in law in his interpretation of the provisions of Article 48(l)(e) of the Federal Constitution having regard to the facts and circumstances;

(b) the election Judge was wrong in law in declaring the first respondent as the properly elected Member of Parliament for the Parliamentary constituency of Bukit Bintang; and

(c) the election Judge's decision dated 2 August 1995 was fatally flawed in law as the first election petition was a nullity.

The law is well-settled that there shall be no appeal from the decision of an election Judge. Section 36 of the Election Offences Act 1954 states that the election Judge shall determine at the conclusion of the trial of an election petition whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Election

Commission or to the State Authority, as the case may be, and upon such certificate being given such determination shall be final.

This legislative provision had been given judicial sanction as long ago as in 1962 by the Court of Appeal in *Re Perting Timor Election (No. 2)* [1962] 28 MLJ 333 and in 1970 when the Federal Court decided in *Tunku Abdullah v. Ali Amberan* [1971] 1 MLJ 25 that the final order of an election Judge is unappealable and therefore the Federal Court had no jurisdiction to entertain the appeal. The same situation arose again in 1982 when the Federal Court held in *Dasun Gabon v. Zulkifle bin Majun and 21 Other Cases* [1982] 1 MLJ 315 that there is no inherent right of appeal to the Federal Court from the decision of an election Judge.

Earlier still in 1967, an election Judge had struck out the petition on the ground that it had not been served in accordance with the rules and considering that the order was interlocutory, he had given leave to appeal under s. 68(2) of the Courts of Judicature Act 1964 (hereinafter "the Act"). The Federal Court had set aside his decision but gave leave to appeal to the Privy Council. The Privy Council had held, in *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, that if the election Judge made a final order it was unappealable, but upon the footing that his order was interlocutory, it was open to the election Judge to give leave to appeal and the Federal Court to entertain it. They further held that while the Privy Council would not entertain an appeal after the final determination of an election petition, the Federal Court, in giving leave to appeal under s. 74 of the Act, had conferred upon the Privy Council jurisdiction to entertain the interlocutory appeal.

Quite correctly therefore, learned Counsel for the appellant had conceded the point that there is no appeal from the decision of an election Judge. Thus the necessity for the Originating Motion for leave to apply for *certiorari*. Before us, he had referred to *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 3 MLJ 228 where the appellants had applied to the High Court for leave to apply for an order of *certiorari* to quash an award of the Industrial Court and for leave to apply for an order of *mandamus* against the Industrial Court. The applications were dismissed in the High Court. The appellants appealed. The Supreme Court held that the guiding principles ought to be that the appellants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in that case, they were of the view that the appellants had *prima facie* an arguable case for the grant of the relief they sought. In my view, this case is not exactly on point as here we are dealing with the decision of an election Judge and not of the Industrial Court.

As for the leave for *certiorari*, a similar application had in fact been made, incidentally before the same trial Judge as in this case, in *Ignatius Stephen*

Malanjum v. Election Judge, Sabah & Anor. [1989] 2 MLJ 433 who had decided that the election Judge sits in the High Court supervising his powers relating to election petitions in accordance with the election law, which is a special law, and he exercises his powers in the same jurisdiction and holds coordinate jurisdiction. Therefore, he added, the Court in which the election Judge sits is not an inferior Court against which an order of *certiorari* or prohibition can be issued.

It is essential for our purpose to reproduce the oral judgment of the Supreme Court in that same matter on appeal as it is not reported. The judgment is as follows:

IN THE SUPREME COURT OF MALAYSIA HOLDEN AT KOTA KINABALU

(APPELLATE JURISDICTION)

SUPREME COURT CIVIL APPEAL NO. 03-42-89

BETWEEN

IGNATIUS STEPHEN MALANJUM ... APPELLANT

AND

ELECTION JUDGE SABAH & ANOR ... RESPONDENT

CORAM: LEE HUN HOE, CJ (BORNEO)
HARUN M. HASHIM, SCJ
MOHD. YUSOFF MOHD., SCJ

ORAL JUDGMENT

On 30.6.1988 Chong Siew Fai, J, sitting as an election Judge held that in the absence of any express provision an election petition had not abated by reason of the fact that the State Legislative Assembly had been dissolved. Therefore, he considered that he had jurisdiction to hear the election petition. Against the decision the appellant appeal but subsequently withdrew the appeal. He then applied for leave to issue an order of *certiorari*.

Many authorities were cited. Some are not binding but persuasive. It is not necessary to go into all these authorities. *South East Asia Fire Brick Sdn. Bhd. v. Non-Metalic Products Manufacturing Employees Union & Ors.* [1981] AC 36 was relied on to show that, despite the ouster clause, *certiorari* would lie if the tribunal was in excess of jurisdiction.

Section 33(l) of the Election Offences Act provides that every election petition shall be tried by the Chief Justice or by a Judge or the High Court nominated by the Chief Justice for the purpose. The scheme of the Election Offences Act seems to be that an election petition must be tried by election Judge but collateral matters can be dealt with by an Election Judge or a High Court Judge as a matter of expediency or convenience. There is no doubt that when an Election Judge makes a decision in an election petition his decision is final.

In order to decide whether leave for the issuance of the prerogative orders of *certiorari* or prohibition sought to be given Mohamad Nor J, had to answer the question whether the Court in which the Election Judge sits is an inferior Court or not. To do so he has to have regard to the Federal Constitution and the election legislation.

There is no election Court as such. What happens is that election Judge sits in the High Court to hear the election. He constitutes a special Tribunal. In view of the peculiar nature of the jurisdiction of the tribunal and the importance of the public interest of securing at an early date a final determination of an election petition the Legislature has clearly created the special tribunal where the ordinary incident of appeal does not apply.

With respect, having regard to the relevant provisions of the election legislation and authorities cited, we agree with the learned Judge that the Court in which the election Judge sits is not an inferior Court against which an order of *certiorari* or prohibition could be issued.

Accordingly we would dismiss the appeal with costs both here and in the Court below. Deposit to respondent's to account of taxed costs.

Further reasons will be given later, if necessary.

(Sgd.)
TAN SRI DATUK AMAR LEE HUN HOE
Chief Justice (Borneo).

This judgment, despite its brevity, seems to have answered the question and we are bound by it. There is therefore no judicial review of the decision of an election Judge who for all intents and purposes has coordinate jurisdiction with, and not inferior jurisdiction to, a High Court Judge.

Probably conscious of the fact that he did not have a ghost of a chance with the *certiorari* point, both before the learned trial Judge and before us, learned Counsel for the appellant had concentrated his submissions on s. 84 of the Act instead to the point that the learned Senior Federal Counsel before us had formed the opinion that learned Counsel for the appellant had in fact abandoned the application for leave for *certiorari* and was just proceeding on the reference point.

According to learned Counsel for the appellant, the learned trial Judge was wrong in not referring the matter to the Federal Court under s. 84 of the Act as regards the effect of Article 118 of the Federal Constitution on the question "whether the provisions of Article 118 of the Federal Constitution preclude *certiorari* from going to quash the decision of an election Judge". He said the framers of the Federal Constitution must have had something in mind in including Article 118 as it is a finality clause.

Subsection (1) of s. 84 of the Act provides that where in any proceedings in the High Court a question arises as to the effect of any provision of the

Federal Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court. Read in its proper context, "the effect of any provision", in my view, must surely mean a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court.

Article 118 of the Federal Constitution states that no election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held. Learned Counsel for the appellant questioned the effect of that Article. Is *certiorari* included or does it imply that a citizen could go no further than an election petition? That is the question the appellant wants to raise in the Federal Court.

What is at stake, he added, is the appellant's right to represent the people in the Parliamentary constituency of Bukit Bintang and not the first respondent who was appointed not by the electorate but by the election Judge. The power given to the election Judge appears to be too wide, he added, and this country cannot have Members of Parliament being appointed by an election Judge.

He had cited a passage from *Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor*. [1979] 2 MLJ 143 where the election Judge had observed that:

> The other point is that the decision of election Judges is not appealable. I do not think election Judges do not make mistakes whereas other Judges do. We are all not infallible. What then happens if an election Judge commits an error? An election Judge has powers to unseat a Prime Minister in an election petition. It appears to me the aggrieved party has no remedies under the law. Perhaps this matter can be also considered so as to safeguard against errors made. Perhaps a quick reference after judgment to the Federal Court within a short period of time to be provided in the law is the answer.

Learned Counsel stressed that there was merit in the application as in fact there is another election petition which had asked for an order to declare the whole general election void. What if the election Judge had agreed, he inquired.

He questioned the fact as to whether contempt of Court is a criminal matter as Article 48(l)(e) of the Federal Constitution uses the word "convicted" but no conviction had ever been recorded in all the earlier matters involving the appellant. In fact, the election Judge had only deemed the offence as a criminal matter. At best, he said, it was a civil matter and Article 48(1)(e) of the Federal Constitution does not apply. For these reasons, he argued, the matter should have been referred to the Federal Court by the trial Judge under s. 84 of the Act.

It is my finding, however, that Article 118 of the Federal Constitution is crystal clear and the learned trial Judge was correct in not acceding to the request of learned Counsel for the appellant. An election can only be called in question by an election petition which in this instance had taken place. So whatever the decision of the election Judge, including his finding on the interpretation of Article 48(l)(e) of the Federal Constitution, rightly or wrongly, that decision stands.

I have since read the judgment in draft of my learned sister, Siti Norma Yaakob JCA, and fully agree with it. For the reasons stated above, it is also my opinion that the decision of the learned trial Judge does not warrant any interference from us and the appeal is accordingly dismissed with costs and the deposit paid to the respondents to account of their taxed costs.

Abu Mansor Ali JCA:

I would like to put in a few words of concurring judgment. I agree with the decision of my learned sister, Dato' Siti Norma Yaakob, JCA and the reasons therefore that this appeal, be dismissed since it is devoid of merits. I have also been shown the final judgment of my learned brother Judge, Dato' Abdul Malek Ahmad, JCA in agreement with her.

I need not have to narrate the facts of this appeal since that has been done elsewhere. Our task has been made somewhat easier by appellant's Counsel on the day of argument reducing his five grounds originally to only two substantial grounds, namely that the learned Judge below had erred in refusing to refer a constitutional question, i.e. Article 118 of the Federal Constitution for the consideration of the Federal Court and secondly that his client should have been given leave to issue a writ of *certiorari* reviewing the decision of the learned election Judge of 2 August 1995 declaring that he was not the winner of the election to the Parliamentary Constituency of Bukit Bintang held on 25 April 1995, since he was a disqualified person, convicted and fined RM7,000 by the Federal Court the day before the nomination day on 14 April 1995.

On the first ground whether the learned Judge was wrong in not having referred to the Federal Court for the interpretation of Article 118 of the Federal Constitution, I agree that there is no merit in the contention that the learned Judge had erred. It is settled law that a reference is only done if a question arises in the course of the proceedings before him and there is ambiguity and it would help to advance the rapid conclusion of that proceeding. Article 118 of the Federal Constitution says:

> 118. Method of challenging election.
>
> No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

In my view the Article cannot be more clear that it needed the interpretation of the Federal Court. The learned Judge, I am sure, would have posed to himself the question: was it a question that had arisen for his determination and whether by referring it would have assisted him in the early conclusion of the proceedings before him which was in actual fact an application for leave under O. 53 Rules of the High Court 1980 to challenge the decision of an election Judge? Shorn of all its ramifications the appellant's application, in substance, if allowed, was really an attempt whose prime object was to challenge and to upset the decision of the election Judge which Parliament, in its wisdom by ss. 34 to 36 of the Election Act, has provided a mode of challenging by an election petition. It has been argued by the appellant, rather forcefully, that an election Judge could err in his decision and can even bring down the whole government, by declaring the whole election void. My answer is it is not for us to question the wisdom of Parliament. What we can say is the task of hearing any election petition has been given by Parliament to a Court of Chief Justice and anyone nominated by him. Parliament has, by s. 36 thereof, laid out that the Judge's decision is final. I am of the firm view that with the above considerations, the answer the learned Judge would have arrived was a refusal to refer and that, in my view, was correct.

With that I come to the other ground of appeal raised by the appellant which was the issue of whether the decision of the election Judge in this case is amenable to review by *certiorari* by another Judge? The first principle of review has been settled and it must be review of a decision of an inferior tribunal over which the Court has supervisory jurisdiction. Is the decision of the election Judge such? I agree with the learned Judge below that the decision of the Federal Court in *Ignatius Stephen Malanjum v. Election Judge, Sabah & Anor*. [19891 2 MLJ 433, which judgment has been fully reproduced by my learned brother Judge Dato' Hj. Abdul Malek bin Hj. Ahmad, JCA in full, a decision by which we are bound, is a sufficient answer to the contention of learned Counsel for the appellant that the election Judge's decision is amenable to *certiorari*. It is not.

I join my learned sister, Dato' Siti Norma Yaacob, JCA and my learned brother, Dato' Hj. Abdul Malek bin Hj. Ahmad, JCA for reasons given by them and by me that the appeal be dismissed with costs.

Reported by W.A. Sharif